No. 91-545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

FORT PECK TRIBAL EXECUTIVE BOARD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPPOSITION OF FORT PECK RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Burlington Northern Railroad Company (Burlington) seeks review of the decision below sustaining a tax imposed by the Assiniboine and Sioux Tribes (Tribes or Fort Peck Tribes) on Burlington's utility property on a right of way across reservation land held in trust by the United States for the Tribes. The petition poses two questions. (Pet. i.) The first goes to the scope of this Court's decisions on tribal taxing power—*i.e.* whether tribes' power to tax nonmember activities on trust lands is limited to situations where there is a consensual rela-

tionship between the tribe and the nonmember putative taxpayer. The second is simply an excuse for Burlington's unfounded forecast of impacts that Burlington asserts will flow from the decision below.

With respect to the first question, this Court three times in the past eleven years has sustained tribal power to tax non-Indians using Indian trust lands. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The Court earlier sustained such a tax in *Morris v. Hitchcock*, 194 U.S. 384 (1904).

The Court has held:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. . . . The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands.

Merrion, 455 U.S. at 137 (1982). The Court based the tribal taxing power not on a consensual relationship with the taxpayer, but on "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Ibid.* The Court concluded that if tribes are ever to be self-governing and provide essential governmental services, as intended by longstanding congressional and executive policy, they must retain the sovereign power to tax non-Indian activities on reservation trust lands owned by a tribe or individual Indians. *Id.* at 137-139 and n.5.

In the district court and court of appeals, Burlington did not contest the Tribes' taxing authority on trust

lands. Burlington argued instead that the Tribes had no power to tax (a) because the Tribes' trust title in the lands underlying the right of way had been completely extinguished, and (b) because general railroad statutes that do not mention Indian tribes divested tribes of the power to tax railroads. The Tribes and the United States opposed Burlington on both issues. Both the district court and the court of appeals rejected Burlington's arguments and applied this Court's recent holdings in a straightforward way to sustain the Tribes' tax.

Before this Court, Burlington does not ask the Court to review the lower courts' rejection of its arguments below. Rather, it tries to create confusion where there is none and manufacture an issue for review. Burlington, to gain exemption from tribal taxation, would have this Court apply here its decisions limiting tribal authority to *prosecute crimes* by non-Indians, or to regulate their activities *on non trust (fee) lands* owned by non-Indians —decisions that no court has ever applied to tribal authority over non-Indians using *trust* lands owned by Indians.

This Court has repeatedly and clearly upheld tribal taxation of non-Indian activities on reservation trust land owned by Indians. The court of appeals followed those precedents, as has every lower federal court ever to consider the issue. There is no reason for this Court to review.

STATEMENT OF THE CASE

The Fort Peck Tribes enacted an ordinance, approved by the Secretary of the Interior, taxing the property of public and private utilities located on trust lands on their Reservation.[1] Burlington filed this action in the United

[1] Def'ts' Ex. 1. Portions of the ordinance are reproduced as Pet. App. G. Exhibits 1 through 10 are attached to Defendants' Memorandum in Support of Motion to Dismiss, filed March 20, 1987 in the district court.

States District Court for the District of Montana on March 11, 1987 to enjoin application of the Tribes' tax to its property on a right of way of 84 miles bisecting the Reservation.

The district court granted summary judgment in favor of the Tribes, and denied Burlington's motion for permanent injunctive relief. 701 F. Supp. 1493, Pet. App. B. The court of appeals unanimously affirmed, 924 F.2d 899, Pet. App. A, and denied Burlington's petition for rehearing, with no judge dissenting. The United States filed a brief *amicus curiae* before the court of appeals supporting the validity of the Tribes' tax.

The background of the Fort Peck tax is as follows. The Tribal Executive Board, the Tribes' legislative body, decided in December 1986 to consider a draft ordinance imposing a three percent tax on the property of utilities that use trust lands on the Reservation.[2] The Board scheduled a public hearing on the draft tax ordinance before its Reservation Development Committee on January 20, 1987.[3] At the hearing, several small non-profit rural cooperative associations providing electrical and telephone services on the Reservation testified that the tax rate was considerably higher than the rate imposed on non-profit cooperatives by the State of Montana, and would substantially injure their businesses. A representative of the local county and a tribal member also testified.[4] Burlington did not appear at the hearing, and presented no written testimony.

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[2] Def'ts' Ex. 2.

[3] Def'ts' Ex. 2. On December 19, 1986, as requested by the Tribes, the Bureau of Indian Affairs (BIA) Agency Superintendent posted public notices of the hearing at prominent places on the Reservation. The notice stated that copies of the draft ordinance were available from the Fort Peck BIA Agency and the Tribal Office. Def'ts' Ex. 5.

[4] All testimony was recorded, and most witnesses submitted written comments as well. Def'ts' Ex. 6 is a compilation of written statements presented at and subsequent to the public hearing.

On January 27, 1987, the Tribal Executive Board enacted the utility property tax ordinance. The Board decided to make two changes in the proposed ordinance after considering testimony presented at the hearing. First, the Board reduced the contemplated tax rate for non-profit cooperative rural electrical and cooperative rural telephone associations from three percent to one percent. Second, it exempted from taxation any utility owning property on trust lands on the Reservation with a total value of less than $200,000. The Bureau of Indian Affairs approved the ordinance on January 28, 1987.[5] The largest single taxpayer, Northern Border Pipeline Company, has paid the Tribes' tax without protest, as have several smaller utility companies using reservation trust lands.

Burlington's operations on the Reservation have resulted in frequent fires on Indian trust lands and serious automobile accidents involving Indians, which have required tribal fire protection and law enforcement services.[6] Since the record was closed in the district court, the Fort Peck Tribes and local county governments have worked together to develop emergency plans to respond to any spill of hazardous materials carried by Burlington across the Reservation, as required by regulations of the Environmental Protection Agency[7] under the Superfund Amendments and Reauthorization Act of October 17, 1986, Pub. L. 99-499, 100 Stat. 1613, 42 U.S.C. §§ 11001-11050.

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[5] Def'ts' Ex. 2.

[6] Affidavit of Tribal Chairman Kenneth E. Ryan, Def'ts' Ex. 11, p. 5. Defendants' Exhibits 11 through 15 are attached to the Brief in Opposition to Motion for Preliminary Injunction filed April 3, 1987.

[7] 40 CFR §§ 350.1, 350.20 and 370.2 require Indian tribes to develop emergency response plans on reservations under this Act.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW CORRECTLY APPLIED RECENT DECISIONS OF THIS COURT SUSTAINING TRIBAL POWER TO TAX NONMEMBERS DOING BUSINESS ON INDIAN TRUST LANDS ON THEIR RESERVATIONS.

A. The Decision Below Is Consistent With the Principles Established by This Court in Cases Involving Tribal Taxes of Activities on Trust Land.

Simply put, this Court's decisions teach that tribes have civil taxing authority over nonmembers' activities *on trust lands*,[8] where those activities significantly affect a tribe. The courts below correctly applied this principle to resolve this case.

Every case ever to consider tribal taxing power over non-Indian activities *on Indian trust lands* has sustained that power—over ninety years and in a great variety of circumstances: *Morris v. Hitchcock*, 194 U.S. 384 (1904) (permit taxes on livestock grazed on tribal trust land); *Colville*, 447 U.S. 134 (1980) (retail sales or excise taxes on purchases of cigarettes); *Kerr-McGee*, 471 U.S. 195 (1985) and *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (possessory interest tax measured by value of leasehold interests in tribal lands and business activity tax measured by the gross receipts from business activity on reservation trust lands); *Merrion*, 455 U.S. 130 (1982), and *Conoco, Inc. v. Shoshone and Arapahoe Tribes*, 569 F. Supp. 801 (D.

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[8] The Fort Peck tax ordinance on its face applies *only* to utility property on reservation trust lands. Section 301(c) imposes the tax on "all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation." Def'ts' Ex. 1, Pet. App. 57a. The Blackfeet ordinance authorizes taxation of possessory interests on all lands within the reservation, including fee lands. The Blackfeet Tribe does not claim that application of its tax to Burlington's possessory interest in its right of way involves fee lands, and Burlington concedes that the Ninth Circuit's decision does not validate taxing non-Indians on fee lands. Pet. 28-29.

Wyo. 1983) (severance taxes on non-Indian mineral lessees of trust lands); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), and *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (taxes on nonmember lessees of trust grazing and farm land). Burlington does not claim any conflict among lower court decisions, and there is none.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court upheld tribal taxes on nonmember purchases of cigarettes by Indians and non-Indians on reservation trust lands. The Court held that "the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty" and that "federal law to date has not worked a divestiture of Indian taxing power." *Id.* at 152.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court sustained a tribal oil and gas severance tax imposed on nonmember lessees of minerals on reservation trust lands who held leases lasting "for so long as the minerals are produced in paying quantities." *Id.* at 135. The Court followed and elaborated on *Colville*, specifically holding that:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. *See e.g., Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824).

Id. at 137. The Court in *Merrion* considered and rejected an argument made by the oil and gas lessees, and adopted

by three Justices in dissent, that since the lessees had leased the lands for over twenty years before the tax was enacted, and could not be excluded from the reservation, the tribe had surrendered its power to tax them. *Id.* at 141-148.

The Court's unanimous decision in *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), sustained that tribe's possessory interest and business activity taxes on non-Indian companies holding mineral leases on reservation trust lands as within "the established, pre-existing power of the Navajos to levy taxes." *Id.* at 199. The Court observed that:

> the Federal Government is "firmly committed to the goal of promoting tribal self-government." . . . The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools and social programs.

Id. at 200-201.

The Court in these three recent cases examined and relied on the historic tradition of tribal governmental authority as recognized by all three branches of the Federal Government since the mid 19th century. The Court relied upon three formal opinions of the Attorney General beginning in 1855, 7 Op. A.G. 174 (1855), 17 Op. A.G. 134 (1881), 23 Op. A.G. 214 (1900), and one opinion by the Solicitor of the Interior Department in 1934, 55 I.D. 14, 46—all of which "recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Colville*, 447 U.S. at 152-153; *Merrion*, 455 U.S. at 139; *see Kerr-McGee*, 471 U.S. at 199. The Court relied on several prior federal court decisions—including this Court's much earlier decision in *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904)—which "have acknowledged tribal power to tax

non-Indians entering the reservation to engage in economic activity." *Colville*, 447 U.S. at 153; *see Merrion*, 455 U.S. at 141-143.

The Court also concluded that "Congress has acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control." *Merrion*, 455 U.S. at 139-140 (relying on a Senate Judiciary Committee acknowledgment of the validity of a tribal tax imposed on non-Indians within the tribe's territory in 1879); *see also Colville*, 447 U.S. at 153 ("authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where that tribe has a significant interest in the subject matter, was very probably one of the tribal powers under 'existing law' confirmed by § 16 of the Indian Reorganization Act of 1934"); *see also Kerr-McGee*, 471 U.S. at 199. Many of these historic authorities relied upon by the Court date from the 19th century or early 20th century, contemporaneous with the time Burlington's predecessors were granted rights of way over the Fort Peck and Blackfeet reservations.

Faced with these holdings of the Court, Burlington in the courts below did not challenge the general taxing power of Indian tribes, and "concede[d] . . . the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members."[9] 701 F. Supp. at 1496, Pet. 20a. In the courts below, Burlington predicated its case on its version of its property rights. Burlington contended that the Fort Peck and Blackfeet Tribes retained no property interest in lands over which the rights of way of Burlington's predecessor were

[9] Railroad's Brief in Support of Motion for Preliminary Injunction, filed March 11, 1987, p. 20; Brief of Appellant Railroad before the Ninth Circuit, p. 21.

granted, and therefore the Tribes lacked power to tax Burlington.[10]

The court of appeals, as well as the district court, rejected Burlington's "property" argument. Both courts carefully examined the language, history and circumstances of the agreements and statutes underlying the establishment of the Fort Peck and Blackfeet reservations. 924 F.2d at 902-904, Pet. 6a-12a; 701 F. Supp. at 1496-1503, Pet. 21a-35a. The courts noted that the Act of April 15, 1874, 18 Stat. 28, Pet. App. D, had established a single large reservation for the three tribes affected, including the Fort Peck Tribes and the Blackfeet Tribe; that in late 1886 and early 1887, the United States by separate agreements with the three tribes defined three separate and relatively smaller reservations of which two are the current Fort Peck and Blackfeet reservations; and that by those agreements the tribes ceded large areas of land *and agreed to grant a railroad right of way through the retained reservations.*[11] 701

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[10] *E.g.*, Brief of Appellant Railroad, pp. 9-15.

Burlington also contended in the courts below that Congress had divested the Tribes of power to tax railroads by special legislation applicable to railroads, chiefly the Railroad Revitalization and Regulatory Reform Act of February 5, 1976, 90 Stat. 31, 49 U.S.C. § 11503. *E.g.*, Brief of Appellant, pp. 21-29. Burlington does not suggest that the lower courts' rejection of this argument merits review in this Court.

[11] Article VIII of the 1886 Fort Peck Agreement provides as follows:

> It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, . . . through any portion of either of the separate reservations established and set apart under the provisions of this agreement, *right of way shall be, and is hereby, granted* for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Def'ts' Ex. 14. (Emphasis added.)

F. Supp. at 1496, Pet. 21a, n.1; 924 F.2d at 900, Pet. 2a. Congress then ratified the agreements by the Act of May 1, 1888, 25 Stat. 113.[12] 924 F.2d at 900, Pet. 2a. *See also British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 162 (1936); *Winters v. United States*, 207 U.S. 564, 567-568, 575-576 (1908) (describing generally these agreements and statutes). As the court below found:

> The parties agree that in 1887, after the agreement was signed but before its ratification, Congress granted Burlington Northern's predecessor-in-interest right of way through what would become the Fort Peck Reservation, occupied by the Assiniboine and Sioux Tribes. See Act of February 15, 1887, 24 Stat. 402.

924 F.2d at 900-901, Pet. 3a.

Based on this study and review, the courts below held that the grant of the railroad easement *did not* extinguish the beneficial title of either tribe in the lands underlying the easement. This decision was identical to decisions of this Court relating to public lands, holding that similar language vested railroads with an easement only in a right of way across public lands, not a fee. 924 F.2d 903, Pet. 8a-9a. Applying this Court's decisions in *Colville* and *Merrion*, the courts below then ruled that "[t]he Tribes' power to tax nonmembers derives from the Tribes' continuing property interest." 924 F.2d at 904, Pet. 10a-12a; *see also* 701 F. Supp. at 1495-1496, Pet. 18a-20a.[13] The determination by the courts below

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[12] Portions of the 1888 Act are contained in Pet. App. F.

[13] The court of appeals also found that "the Tribes have a significant interest in" the subject matter of Burlington's right of way because Burlington receives tribal services—"the tangible benefits of police and fire protection." 924 F.2d at 904, Pet. 10a. Burlington does not deny that it does receive these benefits, *cf.* Pet. 19, and the lower court's finding is well supported by the record, which showed that Burlington's activities on the Reservation frequently cause

that Burlington's right of way crosses reservation trust lands was based on the specific circumstances of the statutes and agreements pertaining to these two reservations, was correct, and does not present a question of general applicability meriting review by this Court.

B. There Is No Confusion or Inconsistency in This Court's Decisions Concerning Tribal Taxing Authority.

Burlington, aware that the land title issue, the principal issue litigated below, presents no question calling for this Court's review, shifts to a fundamentally different issue before this Court. Burlington's petition now urges review on the theory that the lower court "uncritically" followed *Colville* and *Merrion* in a manner inconsistent with "the principles set forth" in four other cases—*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. 8-9, 15. Burlington claims that these four decisions require a holding that tribes have no governmental authority to tax nonmembers using trust lands where the nonmember has not entered into a "consensual" relationship with the tribe or its members.

Burlington is wrong for several reasons—most fundamentally because it seeks to apply this Court's rulings regarding tribes' criminal jurisdiction and those regarding tribal civil jurisdiction over matters on fee lands, to tribes' taxing authority over activities on reservation trust lands. This Court, however, in all of its recent cases has emphasized that the limitations regarding tribal criminal jurisdiction and civil jurisdiction on fee

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fires and automobile accidents that injure Indians and their property and require tribal services. Affidavit of Tribal Chairman Kenneth E. Ryan, Def'ts' Ex. 11, p. 5.

lands simply do not apply to tribal taxing authority on trust lands.

Oliphant and *Wheeler* concern tribal criminal jurisdiction, and teach that tribes have criminal authority over members, and not over nonmembers. *See also Duro v. Reina*, 495 U.S. ——, 109 L.Ed.2d 693 (1990).[14] As the Court specifically recognized in *Colville*, 447 U.S. at 153, cases concerning taxing and other civil authority of tribes over nonmembers on reservation trust lands "differ sharply with *Oliphant*" because the historic tradition of tribal authority to tax is different. See pp. 8-9, *supra*. *See also Duro v. Reina*, 495 U.S. at ——, 109 L.Ed.2d at 705 ("[O]ur decisions recognize broader retained tribal powers outside the criminal context"); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853-854 (1985) ("[T]he reasoning of *Oliphant* does not apply to this case"); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, pp. 253-254 (1982 ed.).[15]

Montana and *Brendale* hold that on *fee* lands owned by non-Indians, a tribe's regulatory power is limited to (1) "activities of nonmembers who enter consensual relationships with the tribe or its members," or (2) "conduct of non-Indians [that] . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-566; *accord Brendale*, 492 U.S. at 428 (plurality

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[14] Congress, however, very recently passed legislation determining that tribes *do* have authority to try and punish crimes committed on their reservations by Indians who are members of other federally recognized tribes. Act of October 28, 1991, Pub. L. 102-137.

[15] Congress has likewise placed greater restrictions on the autonomy of tribes to try criminal cases than civil cases. Thus, while the Indian Civil Rights Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. § 1303, confers *habeas corpus* jurisdiction on federal courts to review tribal court criminal convictions alleged to violate that Act, the Act leaves tribal courts free from federal court review of civil cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

opinion of Justice White); *id.* at 456-457 (opinion of Justice Blackmun). In both these cases, the Court reiterated the distinction between tribal authority over non-Indian activities on trust lands and over non-Indian activities on fee lands on the reservation.[16] *Brendale*, 492 U.S. at 427 (plurality opinion of Justice White) ("*Colville* . . . involved '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members.' . . . It did not involve the regulation of fee lands, as did *Montana*."); *Montana*, 450 U.S. at 557 (tribe can "prohibit nonmembers from hunting or fishing on land . . . held . . . in trust. . . .")

The "consensual relationships" test was first formulated in *Montana* to describe situations where "even on fee lands" tribes might retain some regulatory authority over nonmembers. Burlington grasps at this consensual test as creating a supposed "confusion concerning the scope of an Indian tribe's power to tax nonmembers." Pet. 17. Burlington reads this Court's decisions to mean tribes have no power to tax nonmembers on trust lands unless a consensual relationship exists. Burlington's petition depends on this self-created confusion as a reason for granting review.[17]

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[16] Indian owned lands on reservations are ordinarily held in trust for tribes or individual Indians by the United States. *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 166-167 (1989). Many reservations were opened by Congress to homesteaders in the decades around the turn of the century, and substantial acreage within them was patented to non-Indians. The Court has held that these opening statutes diminished tribal governmental authority over these fee patent lands owned by non-Indians. *E.g.*, *Montana*, 450 U.S. at 558-561; *Brendale*, 492 U.S. at 422-423 (plurality opinion of Justice White).

[17] Burlington even fancies that "the existence of a consensual relationship between the tribe and the nonmember taxpayer" is "the traditional foundation of tribal taxation." Pet. 10, 20. The Court held the contrary in *Merrion*: that tribal power to tax "derives

The holding in *Montana* itself shatters Burlington's contention. The Court in *Montana* "readily agree[d]" that a tribe can "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," 450 U.S. at 557, specifically affirming the Ninth Circuit in this respect. And the Court also determined that the tribe in *Montana* had no "consensual relationship" with the nonmember hunters and fishermen subjected to tribal authority on trust lands. 450 U.S. at 565-566. *See also Duro v. Reina*, 495 U.S. at ——, 109 L.Ed.2d at 705, ("[a]s distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation *or* 'consensual relationships with the tribe or its members. . . .'") (emphasis added). And as to taxation, this Court stated specifically that "[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Merrion*, 455 U.S. at 147.

The court below thus correctly applied the decisions of this Court when it held that "[t]he relevant question is not whether Burlington Northern's activities on the reservation were consensual," 924 F.2d at 904, because that question would only be relevant if a tribe sought to tax activities on fee lands. Burlington concedes that the decision below does not validate any tax on fee lands. Pet. 28-29.[18] In summary, Burlington's assertion cannot con-

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from the tribe's general authority, as sovereign, to control economic activity . . . and to defray the cost of providing governmental services." 455 U.S. at 137. In *Merrion*, moreover, the Court specifically rejected the argument of non-Indian oil companies that, *because* they had a "consensual relationship" with the tribe, the tribe could *not* tax them. *Id.* at 136-137.

[18] Burlington alleges that other tribes have enacted tax ordinances that apply to fee lands, and argues that this somehow supports review of this case, Pet. 29. Nothing in the decision below validates any such taxes, as Burlington concedes. *Ibid.* Lower federal courts

fuse the established holdings of this Court sustaining tribal taxing power relating to trust land owned by Indians with the "consensual relationships" decisions relating to fee land patented to non-Indians.

But, even if a consensual relationship were required for tribes to tax non-Indians using reservation trust lands, the court below correctly found that such a consensual relationship exists in this case, because these tribes "consented to railroad rights of way" in the 1886 and 1887 cession agreements later ratified by Congress in the 1888 Act. 924 F.2d at 904, n.7, Pet. 11a. This interpretation of these particular agreements and statute is correct and does not merit review by this Court.

II. THE TRIBAL AUTHORITY TO TAX SUSTAINED BELOW DOES NOT HAVE "NATIONWIDE IMPLICATIONS" OR OPEN THE DOOR TO UNLIMITED TRIBAL TAXATION.

Burlington's second question for review (Pet. i) is whether the tribal tax power extends to railroads in interstate commerce operating over rights of way acquired from the United States, where discontinuance of the rights of way is subject to federal regulation. The petition contains no explicit discussion in support of the second question. Essentially, Burlington asserts unfounded fears that if the courts below are correct, tribes will impose discriminatory taxes against nonmembers that will threaten to have a significant adverse impact on the financial condition of the Nation's railroads; that the same might happen to other interstate carriers; and that the door would be open to virtually unlimited tribal taxation. Pet. i, 8, 10, 22.

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clearly have ample jurisdiction to determine whether or not a tribe has taxing authority in those circumstances, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and there is no reason to believe those courts will misconstrue the decisions of this Court concerning tribal authority on fee lands.

Burlington's charges are wholly without merit or support in the record below. First, the tribal authority to tax recognized by the court of appeals in this case is limited to utilities that have chosen to use reservation trust lands owned by Indians. And second, as the Court held in *Merrion*, 455 U.S. at 141, tribal authority to tax nonmembers:

> is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Indian tribes are subject to substantial federal control. Both tribal tax ordinances at issue in this case were reviewed and approved by the Secretary of the Interior,[19] as required by the tribal constitutions.[20] And as this Court recognized in *Kerr-McGee*, 471 U.S. at 198, "Congress, of course, may erect 'checkpoints that must be cleared before a tribal tax can take effect.'" In fact, Congress in the wake of adoption of these very taxes *considered but did not enact* legislation proposed by members of the Montana congressional delegation to limit tribal taxing power.[21]

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[19] Def'ts' Ex. 2.

[20] Article VII, Section 3 of the Fort Peck Constitution, Def'ts' Ex. 3, empowers the Tribal Executive Board:

> To make and enforce ordinances covering the tribes' right to levy taxes and license fees on persons or organizations doing business on the reservation, except that ordinances or regulations affecting non-members trading or residing within the jurisdiction of the tribes shall be subject to the approval of the Secretary of the Interior.

[21] In April 1987, both Montana's Senators and a Congressman from Montana introduced bills to require all tribal taxes on non-

Burlington offers no reason for its broad assertion that, in effect, the Court should recast the law to exempt railroads from tribal taxation when they use Indian trust lands. Railroads do not just "happen to cross . . . reservations" with no impacts on surrounding Indian communities. *Cf.* Pet. 25. Clearly, Burlington is more than "a convenient revenue source," Pet. 25; its activities require expenditure of tribal revenues and impact significantly on tribal members. *See* pp. 5, 11 n.13, *supra*. Railroads and utilities receive the benefit of police, fire, and other services on these reservations, as in all other jurisdictions they cross. States tax railroads and utilities even though they may be out-of-state companies who cannot "vote" in the state. *See generally Merrion*, 455 U.S. at 137-138 ("Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal governments").

Tribal taxation of railroad property on reservation trust lands furthers congressional policies of tribal economic self-sufficiency and tribal self-determination. As this Court stated in *Merrion*:

> [w]e agree with Judge McKay's observation that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes."

455 U.S. at 138 n.5. This Court has often affirmed the importance of these modern congressional policies favor-

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members to be reviewed by the Secretary of the Interior and to impose a moratorium on all new tribal tax ordinances. S. 1039, 100th Cong., 1st Sess. introduced on April 10, 1987; H.R. 2184, introduced on April 28, 1987. No hearings were held on the House bill. The Senate Select Committee on Indian Affairs held a hearing on November 12, 1987. The bill died in committee.

ing tribal self-determination and economic self-sufficiency. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development'").

Congress recently expanded the powers of tribes to be the primary provider of governmental services on their reservations while reducing the role of the Bureau of Indian Affairs. Act of October 5, 1988, Pub. L. 100-472, 102 Stat. 2285 (amending the Indian Self-Determination Act, 25 U.S.C. §§ 450 *et seq.*). In doing so, the Senate report stated:

> Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act [in 1975]. In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development. . . . This progress is directly attributable to the success of the federal policy of Indian self-determination.

S. Rep. No. 274, 100th Cong., 1st Sess., p. 4 (1987).

Burlington is of course free to seek redress from Congress, which holds ultimate power in this matter. As Burlington's own petition acknowledges, the Nation's railroads have been far from "powerless" in recent years to persuade Congress to "enact . . . legislation designed to improve their economic condition." Pet. 27 & n.24. But unless Congress acts—in derogation of its own policies of furthering tribal self-determination and economic self-sufficiency—the power of tribes to tax activities on

reservation *trust* lands, as affirmed repeatedly by this Court, remains intact. The court of appeals decision simply followed this Court's decisions on tribal taxing authority. No review by this Court is warranted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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